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JUDGE DOWD

CASE NO. 1

JUDGE

MAG. JUDGE GALLAS

Plaintiffs,

**COMPLAINT FOR DAMAGES AND
OTHER RELIEF**
(Jury Demand Endorsed Hereon)

Defendant.

NATURE OF THE ACTION

- 1 -

PARTIES, JURISDICTION AND VENUE

2. Plaintiff Irwin Industrial Tool Co. is a corporation organized under the laws of the State of Delaware with its principal place of business in the State of North Carolina. For purposes relevant to this action, Irwin Industrial Tool Co. does business under the name of “Bernz-O-Matic” and, therefore, will be referred to hereinafter as “Bernz-O-Matic.”

3. Plaintiff Newell Operating Company (“Newell”) is a corporation organized under the laws of the State of Delaware with its principal place of business in a State other than Ohio. Newell and Bernz-O-Matic are sister companies. Newell is the owner of the patent at issue in this action.

4. Defendant Magna Industries, Inc. is a corporation organized under the laws of the State of Ohio with its principal place of business in Cleveland, Ohio. Magna Industries, Inc. sometimes does business under the name “MagTorch.” For ease of reference herein, Magna Industries, Inc. and MagTorch are referred to collectively hereinafter as “Magna.”

5. Because this action includes a claim for patent infringement pursuant to 35 U.S.C. §271 et seq., this court has subject matter jurisdiction over such claim pursuant to 28 U.S.C. §1331 and 1338. There is also diversity jurisdiction in that the matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between citizens of different states as per 28 U.S.C. §1332.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. §§1391 and/or 1400.

COUNT I

(Breach of Contract)

7. Bernz-O-Matic is a leading marketer and manufacturer of hand held torches,

accessories and related products for national and international markets. Bernz-O-Matic's products include torches and kits, outdoor patio heaters, and solder wires.

8. A number of Bernz-O-Matic's products, including its torches, utilize fuel in their operation, specifically propane and/or a gas called "MAPP gas" (methyl acetylene-propadiene mixture). Bernz-O-Matic thus also markets and sells the referenced propane and MAPP gas. The propane and MAPP gas are packaged and sold in metal cylinders which are compatible with most hand-held torches and to which a torch can be easily connected. Propane and MAPP gas cylinders are available from Bernz-O-Matic both as part of its product kits and also as separate items.

9. Magna is also in the business of marketing and selling hand-held torches and the associated propane and MAPP gas used with those torches.

10. In recent years, Magna has purchased from Bernz-O-Matic a substantial quantity of Magna's requirements of propane and MAPP gas cylinders. Magna has done so by placing purchase orders with Bernz-O-Matic. All such purchase orders are subject to – and, where there is a conflict, superseded by – Bernz-O-Matic's written terms of sale. Bernz-O-Matic's written terms of sale were timely provided to and accepted by Magna. A true and correct copy of Bernz-O-Matic's written terms of sale is appended hereto as Exhibit 1.

11. Because of increases in raw material prices for steel and gas, Bernz-O-Matic, on or about April 29, 2005, timely notified Magna that, effective with orders made by Magna for shipments on and after July 1, 2005, the price Bernz-O-Matic would charge Magna would be increased as follows: a) for propane cylinders, in the amount of \$0.1328 per cylinder; and b) for MAPP gas cylinders, in the amount of \$0.2233 per cylinder.

12. Immediately after receiving notice of the price increase, Magna, in May 2005, submitted some 17 purchase orders to Bernz-O-Matic pursuant to which Magna offered to purchase 313,200 units of propane cylinders and 48,600 units of MAPP gas cylinders, with requested shipment dates ranging from June 3, 2005 through December 16, 2005. These 17 purchase orders are hereinafter called "the May 2005 Orders." All of the May 2005 Orders sought to acquire the subject Bernz-O-Matic propane and MAPP gas cylinders at Bernz-O-Matic's old prices (i.e., the lower prices) for those products. Because they are voluminous, and are already in Magna's possession, copies of the May 2005 Orders are not being appended to this Complaint.

13. Upon receipt of the purchase orders referenced above in paragraph 12, Bernz-O-Matic notified Magna that the orders would not be accepted at the lower price.

14. After a period of negotiation, during which Magna repeatedly reaffirmed its intention and desire to purchase the complete quantity of the Bernz-O-Matic propane and MAPP gas cylinders that were the subject of the May 2005 Orders, the parties reached an agreement as to the May 2005 Orders and any future orders.

15. In consideration of Bernz-O-Matic's agreement to accept the May 2005 Orders and to do so at the lower price (i.e., the old price) stated in those orders, Magna agreed that the May 2005 Orders would be non-cancelable, that it would irrevocably and without qualification accept delivery of all products it ordered in the May 2005 Orders and would do so on the dates specified in those orders (give or take 7 days), and that it reaffirmed its agreement with Bernz-O-Matic's terms of sale. The parties also agreed that any future orders would be at the new prices.

16. This agreement was memorialized, at least in part, in a letter agreement dated May 27,

2005, a true and correct copy of which is appended hereto as Exhibit 2.

17. Subsequently, Magna purported to cancel a number of the May 2005 Orders, in violation of the parties' agreements and Bernz-O-Matic's terms of sale, including the following orders: No. 6026 (MD108267); No. 6027 (MD108269); No. 6029 (MD108271); No. 6030 (MD108272); No. 6031 (MD108274); No. 6032 (MD108275), and No. 6033 (MD108276). Copies of these orders are appended hereto as Exhibit 3. In addition to Magna's attempted cancellation of orders it had agreed would not be cancelable, Magna also refused to pay Bernz-O-Matic the full amount that was due for propane and MAPP gas cylinders that had been shipped to and accepted by Magna.

18. By letter dated October 20, 2005, Bernz-O-Matic notified Magna that its attempted cancellation of the May 2005 Orders was a violation of the parties' agreements and Bernz-O-Matic's terms of sale. Bernz-O-Matic has requested Magna to cure its breach and provide adequate assurance of performance. Magna has refused to do so, and continues to refuse to do so, thereby necessitating this action for breach of contract. Magna's refusal to perform has been clear and unequivocal.

19. By canceling the orders, and also by refusing to pay the full amount owed for products that were shipped to and accepted by Magna, Magna has breached its agreements with Bernz-O-Matic, including the letter agreement and the operative terms of sale, and is liable to Bernz-O-Matic for breach of contract.

20. Bernz-O-Matic has been damaged as a direct and proximate result of Magna's breaches of contract, in an amount to be determined at trial but in excess of \$75,000.00 exclusive of interest and costs.

COUNT II

(Patent Infringement)

21. Plaintiffs incorporate by reference each and every statement and allegation set forth in paragraphs 1 through 20 of this Complaint as if fully rewritten here.

22. United States Patent No. 4,881,894 ("the '894 patent"), entitled "Self-Igniting Portable Torch Assembly," was duly and legally issued by the United States Patent and Trademark Office on November 21, 1989. A true and correct copy of the '894 patent is appended hereto as Exhibit 4.

23. Plaintiff Newell is the owner by assignment of all legal right, title, and interest in and to the '894 patent.

24. Defendant Magna is engaged in the manufacture, sale, marketing, and/or importation of products including, but not limited to, the "Mag-Torch" Model MT 521 Self-Lighting Torch Kit and the "Mag-Torch" Model MT 521C Self-Lighting Torch Head. Magna transacts substantial business relating to the aforementioned products and other products within the state of Ohio, including within this judicial district.

25. Magna has infringed and continues to infringe, directly and/or indirectly, one or more claims of the '894 patent by making, using, selling, offering to sell, and/or importing into the United States certain products, including the "Mag-Torch" Model MT 521 Self-Lighting Torch Kit and the "Mag-Torch" Model MT 521C Self-Lighting Torch Head.

26. Magna's infringement of the '894 patent has damaged plaintiffs.

27. Magna's patent infringement has been and continues to be willful, making this an

exceptional case within the meaning of 35 U.S.C. § 285.

28. Magna's patent infringement has caused plaintiffs irreparable harm, for which there is no adequate remedy at law.

29. Magna's patent infringement will continue unless enjoined by this Court.

WHEREFORE, plaintiffs pray for judgment in their favor as follows:

A. On Count One, for judgment in favor of plaintiff Irwin Industrial Tool Company dba Bernz-O-Matic, and against defendant Magna Industries, Inc., for breach of contract, which judgment shall include an award of compensatory damages in favor of plaintiff Irwin Industrial Tool Company dba Bernz-O-Matic, and against defendant Magna Industries, Inc., in an amount to be determined at trial but in excess of \$75,000.00 exclusive of interest and costs;

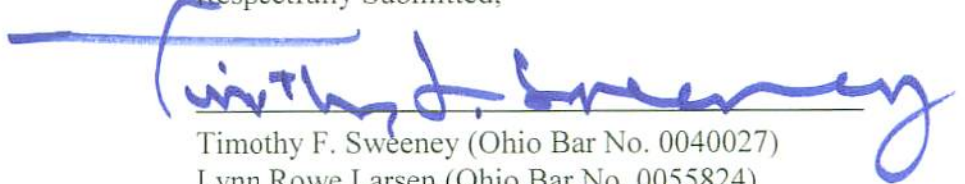
B. On Count Two, for judgment in favor of plaintiffs and against defendant Magna Industries, Inc. as follows: that defendant has literally infringed, directly and/or indirectly, one or more claims of the '894 patent; that defendant has infringed, directly and/or indirectly, one or more claims of the '894 patent under the doctrine of equivalents; that defendant, and those acting in concert with it, be enjoined from further acts of infringement of the '894 patent; that defendant be required to pay all damages sustained by plaintiffs, in an amount not less than a reasonable royalty, as a result of defendant's infringement of the '894 patent; that such damages be trebled due to defendant's willful infringement; that this be declared an exceptional case pursuant to 35 U.S.C. § 285; and that plaintiffs be awarded their reasonable attorneys fees;

C. Pre-judgment and post-judgment interest on all sums awarded, as may be appropriate;

D. Attorney fees and the costs of this action; and

E. Such other and further relief in favor of plaintiffs, or either of them, as this Court shall deem just and appropriate.

Respectfully Submitted,



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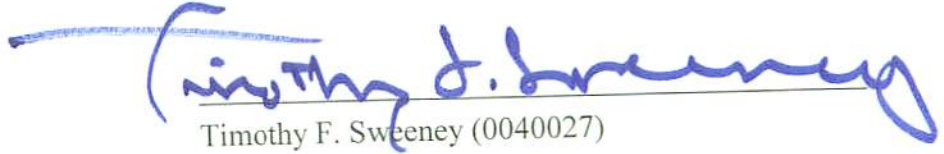
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JURY DEMAND

Plaintiffs demand a trial by jury on all issues and claims so triable.

A handwritten signature in blue ink, reading "Timothy F. Sweeney", is written over a horizontal line. The signature is stylized with a large initial 'T' and a long, sweeping underline.

Timothy F. Sweeney (0040027)

Counsel for Plaintiffs Irwin Industrial Tool Co. and
Newell Operating Company